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Why Was That Band Deported?

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A U.S. Customs and Border Protection (CBP) officer's patch, photographed in Miami in March 2015. CBP officials denied entry to the Italian band Soviet Soviet last week and deported its members.

Joe Raedle/Getty Images

Last Friday afternoon, a controversy erupted about the Italian post-punk band Soviet Soviet, who were denied entrance to the United States on Wednesday and detained overnight before being deported back to Italy.



THE RECORD

Italian Band Soviet Soviet Denied Entry To The U.S., Jailed And Then Deported

In the wake of that news, there was a huge wellspring of reader commentary and questions about what had happened. To help clarify, we're digging into the thickets of U.S. policy, specifically the regulations surrounding performing artists, as well as various interpretations of those regulations, to figure out what exactly happened — and what musicians, fans and industry professionals alike can learn from the Soviet Soviet situation.

It is also very likely that there will be other denials of entry for other performers trying to enter the U.S. in the coming days and weeks, especially as the South by Southwest [SXSW] festival, which begins today, continues. Just last night, the band Massive Scar Era, who were like Soviet Soviet also hoping to perform at SXSW, posted a video claiming that they were denied entry as well, though under a different set of circumstances. This afternoon, two British acts, Yussef Kamaal and United Vibrations (who share drummer Kamaal Dayes), also announced that they would be canceling their SXSW dates. Their cancellations came after travel permission for Dayes and two of his brothers, who also play in United Vibrations, was allegedly revoked.

What exactly did Soviet Soviet do wrong?

The Italian trio has stated it tried to come into the U.S. for a number of performances: a showcase at SXSW, a live performance at Member Station KEXP and at least two other shows. It's those two other shows that seem to have formed the basis of the Custom and Border Protection [CBP] officials' decision to deport the bands' members. NPR is basing our interpretation of these events on statements made by Soviet Soviet and the Department of Homeland Security [DHS], as well as in articles by and interviews with several immigration lawyers.

According to Soviet Soviet, its members told immigration officials that at two of the planned shows, the venues would be charging fans entry fees, but that the band itself would not get paid for those performances. The group seemed to believe that not

receiving income from those shows would keep it on the right side of CBP — but this is exactly where Soviet Soviet's case goes sideways.

How so?

As Italians, the band tried to enter the U.S. under the Visa Waiver Program (also known as ESTA), which permits citizens of nearly 40, mostly Western European countries to come into the U.S. for up to 90 days as non-working tourists.

However, under the Visa Waiver Program or as holders of tourist visas, travelers to the U.S. are theoretically allowed to solicit future business while in the U.S.

As immigration lawyer Leena Khandwala explained to NPR earlier this month, this can mean doing things like attending a conference or convention, meeting with clients, or attending a meeting. Musicians often interpret this regulation as permitting them to perform at a showcase at a large industry event, such as SXSW.

Is the "showcase exception" a real thing?

That's up for interpretation — and the "showcase exception" is not a universally accepted standard. One prominent immigration attorney who specializes in working with international performers, Brian Taylor Goldstein of GG Arts Law, wrote an article last week arguing that there is no such exception:

"Artists cannot perform on visitor visas (B-1/B-2) or through the Visa Waiver Program ('ESTA') regardless of whether or not they are being paid and regarding of whether or not tickets are sold. Except in the most narrowly defined circumstances, US immigration law has always defined 'work' as it pertains to artists, as any kind of performance. Artists denied entry on the basis of fraud, will have a denied entry on their record, impeding future visas and travel."

On the other hand, certain presenters and festivals — including SXSW — do encourage artists to utilize this theoretical exception, provided that they don't try to do other performances or activities while in the U.S.

As Roland Swenson, SXSW's co-founder and CEO, argued to NPR earlier this month, securing a work visa is beyond the reach of many musicians, especially younger or emerging acts. (More on those work visas below.) "If the artists had to qualify for other types of visas," Swenson said, "they might not have the career credentials to gain those."

In essence, what SXSW was saying was that if bands choose to try to come into the U.S. under the so-called "showcase exception," then they can only perform at an industry-focused event like SXSW. (Whether or not SXSW is solely an industry event at this point — considering the fact that tens of thousands of SXSW passes are sold to fans and not just to music-business professionals — is a matter for another day.)

Did Soviet Soviet even use the "showcase exception" correctly?

Apparently not — the band seemed to believe that their planned non-paid appearances were equivalent to showcases, and CBP apparently disagreed. (KEXP reported on Friday that the Department of Homeland Security [DHS] "maintained the position that the band lacked the proper visa for entry into the United States.")

Two immigration attorneys who specialize in securing visas for performing artists — Matthew Covey and Will Spitz of the non-profit organization Tamizdat — posted a piece on Facebook over the weekend that posited why Soviet Soviet were specifically wrong. They wrote:

"Soviet Soviet was doing precisely what the much maligned SXSW invitation letter was attempting to caution them against doing. As monstrous as reports of CBP's handling of Soviet Soviet sound, it is clear that these artists were entering the U.S. intending to violate U.S. law. They were scheduled to play non-showcase events, and even after all last week's fuss, they still did not understand: not getting paid does not mean you don't need a visa. That they did not understand the law is, of course, unfortunately 'no defense.'"

Soviet Soviet says that its members were handcuffed and kept in jail overnight before being put on a flight back to Italy. Is that standard treatment?

According to the statement that DHS gave to KEXP, the answer is yes, though the response referred to "restraints" rather than "handcuffs," and described the place in which the three men were held as a "detention facility" rather than a "jail."

"When a traveler is deemed inadmissible, CBP makes every effort to return the traveler without delay. CBP does not have an overnight detention facility at the airport. Therefore, it is standard procedure for any traveler who is deemed inadmissible and is awaiting return travel to be taken to a detention center until return travel is available. According to CBP policy, it is standard procedure to restrain a traveler who is being transported to a detention facility. The use of restraints on detainees during transport is in a manner that is safe, secure, humane, and professional. It is the responsibility of officers to ensure that the need and level of restraints used is consistent with the operational office's policies and procedures. At no time are restraints used in a punitive manner or in a manner that causes detainees undue pain."

So was the band denied entry on security grounds, or for economic reasons?

Covey and Spitz argue that the CBP's rationale in the Soviet Soviet case is entirely economic. They say that the reason that the current regulations exist in the way they do is a matter of protecting American labor:

"In this case, the U.S. artist visa laws were written for Congress by the artists' labor unions in the late eighties with the intent of protecting the interests of U.S. labor — American performing artists. So let's do a hypothetical: Imagine a group of lumberjacks in British Columbia wanted to enter the U.S. to log in Washington State; naturally the U.S. government would say 'No way, not unless you can get a work visa first.' But these loggers reply, 'Well we like logging so much, how about we do it for free! That's ok, right?' No, it's not, and in fact from a labor standpoint, the fact that they are working for free is WORSE than them getting paid: not only are they taking the jobs of individual American lumberjacks, they are generally depressing the value of the labor of U.S. lumberjacks! So from a labor standpoint, foreign musicians playing in the U.S. for free is anything but harmless. (Artists can get visas to perform in the U.S. of course; but they have to prove that they are eligible for an O or P visa, which is issued when the artist's importance to American business or cultural interests is deemed to outweigh their threat to labor interests.)"

But it also seems true that there are plenty of performance opportunities to go around: in 2016, nearly 600 international acts from more than 65 countries played SXSW showcases — but there were more than 2,200 official performers in total.

Is it going to be harder for international artists to come to the United States in the future?

In a word: possibly. Of course, if more artists try to skirt visa regulations, it's very likely that CBP will scrutinize all musicians' entries even more closely.

However, it's already very challenging to obtain what's called an O or P visa, which are two of the kinds of visas granted to musicians and other performers. In order to qualify, individual artists (who would apply for an O category visa) or bands (a P visa) have to qualify as "aliens of extraordinary ability in the arts."

Getting one of these O or P visas takes many months, thousands of dollars and piles of paperwork, reviews and letters of recommendation attesting that the applying musicians have already built a professionally significant and generally recognized career. As the United States Citizenship and Immigration Services [USCIS] website explains, the government will grant these visas only under very specific conditions:

"Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of the arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts."

That is to say, if you're a young, independent artist or band only starting to make your mark on the music scene — and hoping that a performance at an event like SXSW is going to boost your visibility to American bookers, agents, record labels and the like — it's pretty improbable that the U.S. government is going to deem you "renowned."

And as lawyer Brian Taylor Goldstein explained in his article, even if an O or P visa is issued, it remains totally up to the discretion of an individual immigration officer at the border to allow — or refuse — someone's entry into the U.S., regardless of what visa that person is carrying. "An Immigration Officer has the unfettered authority and

discretion to deny entry to any artist from any nationality for any reason," he wrote. "To what extent this authority will be exercised remains to be seen."

But will things be harder in the *immediate* future, given the heavy emphasis the Trump administration has put on travel, border control and immigration?

The laws regarding visa work rules have existed for years — well before the Trump administration took office. But the process for obtaining permission to travel to the U.S., including petitioning for an O or P visa, is becoming potentially more onerous and time-consuming than it was even a few months ago. This is partly because of President Trump's most recent executive order on immigration, which was issued on March 6.

In the past, officials at individual consulates could choose to waive in-person interview requirements if someone was seeking to renew an O or P visa within 12 months of a previous O or P visa expiring. The idea was that since such an applicant had already been interviewed and vetted fairly recently, and since that person would have a demonstrated professional history already on the books, it wasn't necessary to have the applicant come back to the U.S. consulate for another interview.

According to Section 9 of this executive order, however, all individuals seeking a non-immigrant visa — including previous holders of O or P visas — must return to U.S. consulates for personal interviews.

As Goldstein noted, "Until additional consular staff is hired, [the] Order will place enormous burdens on U.S. consulates and embassies — particularly high-volume consulates — by increasing already extended interview wait times and processing times, wasting limited resources and potentially decreasing the quality of consular interviews."

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